

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NANCY A. JAHNKE)	
Claimant)	
VS.)	
)	Docket No. 204,422
RILEY COUNTY, MANHATTAN HEALTH DEPARTMENT)	
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals from the Award of Administrative Law Judge Bryce D. Benedict dated June 5, 1998, wherein the Administrative Law Judge granted claimant benefits based upon claimant's functional impairment, but denied claimant benefits for a permanent partial work disability, finding claimant had failed to make a good faith effort to seek employment after the injury.

APPEARANCES

Claimant appeared by her attorney, Roger D. Fincher of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Gregory D. Worth of Lenexa, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board.

ISSUES

What is the nature and extent of claimant's disability? Specifically, has claimant made a good faith effort to find employment after her injury, thus entitling her to a work disability as a result of her June 10, 1994, accident? Claimant argues, in the alternative, that she is permanent totally disabled.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant worked for Riley County Health Department as a parent educator for eight years. On June 10, 1994, claimant twisted and injured her back while retrieving information for a client from the seat of her car. Claimant was referred to Dr. Craig Yorke, a neurosurgeon, who, after diagnosing a herniated and bulging disc, performed a lumbar laminectomy on October 31, 1994. Claimant's condition improved for two days and then began to worsen after the surgery. Claimant was reexamined by Dr. Yorke on December 20, 1994, at which time a second MRI was performed. The MRI did not show any signs of a recurrent ruptured disc. Claimant contends her post-operative condition is substantially worse than before the surgery, and she is physically incapable of performing any job. Claimant contends she is either 100 percent permanently partially disabled or is entitled to an award for a permanent total disability.

Claimant was referred to Dr. Edward Prostic, an orthopedic surgeon, at the request of her attorney. Dr. Prostic concluded that claimant was totally disabled based upon her subjective complaints. In his August 1, 1996, examination, Dr. Prostic diagnosed fibrosis at the right lateral recess at L5-S1. He found claimant suffered from chronic pain syndrome, and opined that she was 100 percent disabled on a functional basis. Dr. Prostic acknowledged a substantial portion of claimant's disability was based upon her subjective complaints. If claimant were to be rated based upon her objective restrictions and findings, she would have a 13 percent functional impairment to the body as a whole.

During the physical examination, Dr. Prostic found claimant to have no tenderness in the lumbar spine, with only a mild loss of range of motion. Claimant was able to walk on her heels and toes, showing good power and good coordination in both lower extremities. Claimant indicated symptoms only in her right leg, but when he tested for strength, the right leg was equal to that of the left. Claimant was able to squat completely and had normal function of her hips, knees and ankles with no atrophy in either leg. Claimant had no loss of sensation, her reflexes were symmetrical and her straight leg raise test was negative, indicating no active radiculopathy.

Dr. Prostic felt claimant's permanent total disability was based upon a combination of her pain complaints, her post-operative findings and her lack of response to appropriate treatment. He agreed the primary component of her permanent total condition was the extreme complaints of pain displayed by claimant during the examination.

Claimant was referred to Dr. Dale Darnell, a board certified orthopedic surgeon in Kansas City, Missouri, at the request of the Administrative Law Judge. He conducted an independent medical examination of claimant on April 2, 1997. During the examination, claimant displayed significant levels of pain. He could find nothing in his examination by way of objective findings which would account for the severity of her pain complaints.

During the examination, he found claimant able to walk without a limp. Her deep tendon reflexes were equal and active, which was an improvement over a previous recorded examination indicating diminished reflex in the right side at the ankle. Claimant could walk on her toes and heels, also indicating normal muscle strength, which again was an improvement over a previous examination. Her sciatic stretch tests were negative, indicating no pressure on the nerve, and claimant could activate her gluteus maximus muscles without difficulty, again indicating that the nerve supply to these muscles was appropriate. Claimant described constant, unrelenting, debilitating pain in her low back, right buttock and right leg. Claimant could not sit because of the pain, could not stand for more than a short period of time, and was restricted in any activity based upon her perception of her own subjective complaints more than any positive objective findings elicited during his examination. Dr. Darnell assessed claimant an 18 percent permanent partial whole body functional impairment based upon the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised).

Claimant testified before the Administrative Law Judge on two separate occasions; first, at the November 6, 1996, preliminary hearing, and later at the March 26, 1998, regular hearing. The Administrative Law Judge, after having had the opportunity to view claimant in person during the two hearings, found that she exaggerated her behavior, had little credibility, and grossly exaggerated her pain and disability.

The Appeals Board did not have the opportunity to view claimant's testimony in person, but did read the multiple complaints expressed by claimant during the two times she testified. The Appeals Board also had the opportunity to view the videotape of claimant provided by respondent during the deposition of Robert Pumford, Regional Manager for Blue Eagle Investigations. In the videotape, claimant was observed entering and exiting cars on several occasions, sitting for periods of time well in excess of that described by claimant in her testimony, and bending at the waist on more than one occasion with no apparent limitation or restriction.

The Appeals Board has, on many occasions in the past, given some deference to the opinion of the administrative law judge when dealing with the credibility of witnesses who testify live before the administrative law judge. In this instance, after reviewing the testimony and viewing the videotape, the Appeals Board does not need to defer to the Administrative Law Judge, but instead concurs with his finding that claimant has little credibility, and has grossly exaggerated her pain and disability.

Claimant testified she had not worked after her injury with respondent, and had made no attempts to obtain work due to her self-perceived, substantial physical limitations. In fact, claimant has taken herself out of the open labor market with little or no medical justification. K.S.A. 44-510e defines permanent partial disability as:

. . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In considering claimant's entitlement to a work disability, the Appeals Board must also consider the policies set forth in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Copeland, the Court of Appeals obligated that a worker make a good faith effort to obtain post-injury employment. If it was found that a good faith effort had not been made, then the trier of facts was obligated to impute a wage based upon the evidence in the record as to claimant's wage earning ability. Claimant has failed to prove a good faith effort in attempting to find post-injury employment.

Vocational expert Karen Crist Terrill opined, when considering restrictions imposed by Dr. Darnell, that claimant had the ability to work as a paraprofessional with an income equal to or greater than what she was earning at the time of the accident. Ms. Terrill explained that this type of employment would conform to claimant's restrictions, enabling her to alternate sitting or standing based upon her comfort level. The Appeals Board finds, based upon the opinions of Dr. Darnell and Ms. Terrill, that claimant possesses the ability to perform work at a wage which would be comparable to that she was earning at the time of her injury with respondent. Claimant's refusal to attempt any work is in violation of the policies in Copeland, and the Appeals Board imputes to claimant a post-injury wage equal to that being earned at the time of the accidental injury. Pursuant to the mandate set forth in K.S.A. 44-510e, the Appeals Board finds claimant is limited to her functional impairment.

In considering the opinions of the two physicians who testified in this matter, the Appeals Board finds the opinion of Dr. Darnell to be the more credible. While Dr. Prostic assessed claimant a 100 percent functional disability, he agreed that a substantial portion of this disability was based upon claimant's subjective complaints. As discussed above, the lack of credibility attributed to claimant would negate any medical opinion based upon subjective complaints, which must necessarily rely upon a credible claimant. The Appeals Board, therefore, finds that the 18 percent functional impairment assessed claimant by

Dr. Darnell is the most appropriate, and the Appeals Board affirms the Award by the Administrative Law Judge in that respect.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated June 5, 1998, should be, and is hereby, affirmed, and claimant is entitled to 87 weeks temporary total disability compensation at the rate of \$249.84 per week totaling \$21,736.08, followed by 61.74 weeks permanent partial disability compensation at the rate of \$249.84 per week totaling \$15,425.12, making a total award of \$37,161.20, for an 18% permanent partial general body disability and based upon an average weekly wage of \$374.74, for an injury suffered on June 10, 1994.

As of the date of this Award, the entire Award is due and owing, and ordered paid in one lump sum minus any amounts previously paid.

Claimant's attorney fee contract is approved insofar as it does not contravene the limitations set forth in K.S.A. 44-536.

Unauthorized medical is awarded up to \$500 upon presentation of an itemized statement verifying same.

Future medical treatment will be considered upon proper application to and approval by the Director.

The fees necessary to administer the costs of the Workers Compensation Act are assessed against the respondent and its insurance carrier to be paid as follows:

Nora Lyon & Associates	\$503.10
Curtis, Schloetzer, Hedberg, Foster & Associates (Deposition of Edward J. Prostic - Amount Unknown)	\$312.25
Metropolitan Court Reporters, Inc.	\$462.10
Deposition Services	\$199.10

IT IS SO ORDERED.

Dated this ____ day of March 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Topeka, KS
 Gregory D. Worth, Lenexa, KS
 Bryce D. Benedict, Administrative Law Judge
 Philip S. Harness, Director